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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

ABDOLLAH ZEKRI, TAMEKIA BROOKS,
LILLIAN STEPHENS, AND KENNETH RAILEY,

Petitioners,

v.

MACY'S RETAIL HOLDINGS, INC.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The circuits are split on whether a district court must dismiss or stay an action after entering an order that compels and resolves all claims relating to arbitration. Because a dismissal is a final decision and a stay is not, the label attached to such a ruling has significant legal and practical consequences.

The question presented for review is whether an order that compels and resolves all claims relating to arbitration, but purports to "stay" instead of dismiss the case is a "final decision" for purposes of appellate jurisdiction.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Abdollah Zekri, Tamekia Brooks, Lillian Stephens, Kenneth Railey, and Macy's Retail Holdings, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW I

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT II

TABLE OF CONTENTS III

TABLE OF AUTHORITIES V

THE BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 4

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT 4

FACTS 5

ARGUMENT – REASONS FOR ALLOWING THE WRIT 13

A. THE CIRCUITS ARE SPLIT ON WHETHER A DISTRICT COURT MUST DISMISS OR STAY AN ACTION AFTER ENTERING AN ORDER THAT COMPELS AND RESOLVES ALL CLAIMS RELATING TO ARBITRATION. 13

B. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT 19

1. The Question Of Whether An Order Compelling And Resolving All Claims Relating To Arbitration is a "Final Decision" Remains Unsettled And Is An Important Issue Of Federal Law 19

2. The Question Of Whether An Order Compelling And Resolving All Claims Relating To Arbitration is a "Final Decision" Significantly Affects the National Policy Favoring Arbitration 23

3. Under the Current State of the Law, District Courts have Been Afforded Authority to Decide Whether Appellate Jurisdiction Exists Over an Order that Compels and Resolves all Issues Relating to Arbitration 29

B. THE DECISIONS BELOW ARE INCONSISTENT WITH THE NATIONAL POLICY FAVORING ARBITRATION. 32

CONCLUSION 36

TABLE OF APPENDICES 37

TABLE OF AUTHORITIES

CASES

Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161 (5th Cir. 1992) 13

American Express Fin. Advisors v. Markarrewicz, 122 F.3d 936 (11th Cir. 1997) 11

ATAC Corp. v. Arthur Treacher's, Inc., 280 F.3d 1091, 1096 (6th Cir. 2002)..... 9, 16, 31

Bernhardt v. Ply graphic Co. of America, Inc., 350 U.S. 198 (1956) 33, 34

Delgrosso v. Spang and Co., 903 F.2d 234 (3d Cir. 1990) 7

Freytag v. Commissioner, 501 U.S. 868 (1991)..... 20

Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000) .....*passim*

Green v. Ameritech Corp., 200 F.3d 967 (6th Cir. 2000) 14

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 19, 22, 25

Kontrick v. Ryan, 540 U.S. 443 (2004) 19

Lloyd v. Hovensa, LLC, 369 F.3d 263 (3d Cir. 2004)14

Long John Silver's Restaurants, Inc. v. Cole, 514 F.3d 345, 349 n. 5 (4th Cir. 2008) 12

Mansfield & C.L.M. Ry. Co. v. Swan, 111 U.S. 379 (1884) 20, 21, 22, 36

Mohawk Indus. v. Carpenter, No. 08-678, slip op. at 4, 558 U.S. –, 130 S.Ct. 599, 605 (2009) 15

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 1, 18, 28, 29

Murray Oil Products v. Mitsui & Co., 146 F.2d 381 (2d Cir. 1944) 33

Napleton v. General Motors Corp., 138 F.3d 1209 (7th Cir. 1998) 17

Penn-West Associates, Inc. v. Cohen, 371 F.3d 118 (3d Cir. 2004) 7, 20

Reed Elsevier, Inc. v. Muchnick, No. 08-103, *slip op.* at 5-7, 559 U.S. —, 130 S.Ct. 1237(2010) 20

Salim Oleochemicals v. M/V Shropshire, 278 F.3d 90 (2d Cir. 2002) 17, 31

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) 32

Sparling v. Hoffman Const. Co., Inc., 864 F.2d 635 (9th Cir. 1988) 14

Steel Co v. Citizens for a Better Environment, 523 U.S. 83 (1998) 21

Swint v. Chambers Cty. Comm'n, 514 U.S. 35 (1995) 2, 10, 31

STATUTES

28 U.S.C. § 1254 2

28 U.S.C. § 1291 ..... *passim*

29 U.S.C. § 216(b) 7

9 U.S.C. § 16(a)(3) 4, 15

9 U.S.C. § 3 ..... 4, 6, 17

9 U.S.C. §§ 16(b)(1), (2) 10

OTHER AUTHORITIES

Pierre H. Bergeron, *District Courts as Gatekeepers? A New Vision of Appellate Jurisdiction Over Orders Compelling Arbitration*, 51 Emory L.J. 1365 (Fall 2002) 17, 31

RULES

FED. R. APP. P. 38 24

FED. R. CIV. P. 11 24

FED. R. CIV. P. 20 7

FED. R. CIV.P. 54(b) 32

SUP. CT. RULE 13 1

SUP. CT. RULE 14(f) 2

TREATISES

16-108 Moore's Federal Practice - Civil § 108.04[1] 26

STATEMENT OF THE CASE

THE BASIS FOR JURISDICTION

(i) This Court exercises plenary review of decisions involving jurisdiction, including whether a a ruling constitutes a "final decision" within the meaning of 28 U.S.C. § 1291; *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). The Eleventh Circuit Court of Appeals entered an order dismissing Petitioners' appeal on January 28, 2011. (App., pgs. 1-2). This petition is timely filed pursuant to SUP. CT. RULE 13. The ninetieth (90th) day after the judgment was rendered is April 28, 2011.

(ii) There has been no request for rehearing or rehearing *en banc* before the United States Court of Appeals for the Eleventh Circuit, nor has there been

a request to extend the time to file this petition for a Writ of Certiorari.

(iv) The statutory provision conferring jurisdiction on this Court is 28 U.S.C. § 1254(1). *See generally Swint v. Chambers County Comm.*, 514 U.S. 35, 41 (1995)(Exercising authority to decide whether a circuit court had jurisdiction to consider an appeal).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE

Pursuant to SUP. CT. RULE 14(f), Petitioners state that the following statutes are involved in this case:

The statute conferring appellate jurisdiction from decisions of a United States District Court, 28 U.S.C. § 1291; provides, in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . , except where a direct review may be had in the Supreme Court. . . .

The Federal Arbitration Act provides, in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3, and

> **(a)** An appeal may be taken from— . . .
>
> **(3)** a final decision with respect to an arbitration that is subject to this title.

9 U.S.C. § 16(a)(3).

STATEMENT OF THE CASE

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The basis for federal jurisdiction in the Eleventh Circuit was that it was an appeal as a matter of right from a final judgment of a United States District Court under 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(3), which incorporates the standard for a final decision under 28 U.S.C§ 1291.

FACTS

On June 7, 2010, Petitioner Zekri brought this FLSA collective action to recover unpaid overtime on behalf of himself and similarly situated Macy's employees. (App., p. 28). Subsequent to the filing of this action, Petitioners Tamekia Brooks, Lillian Stephens, and Kenneth Railey, all current or former Macy's employees, filed forms entitled "Consent to be Party Plaintiffs." (App., p. 19).

After Petitioners Brooks, Stephens and Railey filed forms purporting to consent to be plaintiffs in Zekri's collective action, Macy's filed a motion to strike Zekri's collective action allegations, compel Zekri and the other Petitioners to arbitrate their overtime claims on an "individual" basis, or, in the alternative, to dismiss or stay the action. (App., pgs. 20-21). Macy's contended that Zekri and the other Petitioners had entered into an arbitration

agreement which forbade them from filing or joining a collective action against Macy's. (App., pgs. 20-21).

On November 4, 2010, the District Court entered an order striking Petitioners' class [collective] allegations, compelled each Petitioner to arbitrate his or her claims on an "individual basis," and directed the clerk of court to "administratively close" the case. (App., p. 11). The District Court's order resolved all claims before it regarding arbitration:

> For the foregoing reasons, the Court ... GRANTS defendant's motion for an order compelling arbitration on an individual basis, striking class [collective] allegations, and dismissing or staying action pending arbitration ... ; STRIKES plaintiffs' class allegations; and ORDERS the parties to proceed to arbitration on an individual basis in accordance with their agreement(App., p.). Pursuant to 9 U.S.C. § 3, this action is STAYED pending arbitration, and the Clerk is DIRECTED to ADMINISTRATIVELY CLOSE this case.

(App., p. 11).

The District Court's order did not contain a provision allowing Zekri or the Petitioners to re-open the case, which is common where courts "administratively close" cases. *Penn-West Associates, Inc. v. Cohen*, 371 F.3d 118, 133 (3d Cir. 2004)(Alito, J., dissenting). Nothing in the District Court's order contained the clarifying language regarding finality previously suggested by Justice Alito. *Penn-West*, 371 F.3d at 132. (*citing Delgrosso v. Spang and Co.*, 903 F.2d 234 (3d Cir. 1990).

Nothing in the District Court's order addressed Petitioners Brooks, Stephens and Railey's status as parties under 29 U.S.C. § 216(b) or purported to join them as parties under FED. R. CIV. P. 20. The District Court's order did not explain the basis for its authority to stay a case and retain jurisdiction over individuals (Petitioners Brooks,

Stephens and Railey) who had neither filed the case nor were allowed to join the action as parties. (App., pgs. 3-11). The District Court's order did not explain the legal basis for compelling Brooks, Stephens, and Railey —non-parties— to arbitrate. (App., pgs. 3-11).

The District Court necessarily concluded it had authority to treat Zekri's case as a collective action for purposes of compelling Zekri and the other Petitioners —putative opt-in plaintiffs— to arbitrate while simultaneously striking Zekri's collective action allegations based on the absence of the jurisdiction to hear and, presumably, Zekri's lack of standing to bring, an FLSA collective action. (App., pgs. 3-11).

Irrespective of whether it correctly analyzed the legal issues regarding FLSA collective actions, the District Court's order was remarkable for its lack of analysis and clarity as to finality and, if a "final

decision," as to whom. (App., pgs. 3-11). This is not an isolated problem. *See ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091, 1096 (6th Cir. 2002) (Noting circumstance where it was necessary to vacate and remand case due to difficulty in determining whether district court's order to compel arbitration was final or interlocutory).

Petitioners timely filed a notice of appeal, and pursuant to a briefing schedule ordered by the Eleventh Circuit, submitted a brief arguing both jurisdiction and the merits, i.e. that the FLSA's collective action provision is substantive and therefore not subject to contractual waiver. (App., pgs. 22-23).

The Eleventh Circuit, apparently concluding that labeling the order a "stay" and "administratively clos[ing]" the case was a valid retention of jurisdiction by the District Court. entered a *sua*

sponte order dismissing Petitioners' appeal for "lack of jurisdiction," *citing* 28 U.S.C. §1291 and 9 U.S.C. §§ 16(b)(1), (2). (App., pgs. 1-2).

The Eleventh Circuit's order did not set forth the basis for its authority to dismiss the appeal as to Petitioners Brooks, Stephens, and Railey —non-parties— leaving it to speculation as to whether it based its authority to dismiss Petitioners Brooks', Stephens' and Railey's appeal on "pendent appellate jurisdiction" or some other theory. *Cf. Swint v. Chambers Cty. Comm'n*, 514 U.S. 35 (1995)(Jurisdiction over one litigant's appeal do not necessarily confer jurisdiction over a co-litigant's appeal).

The Eleventh Circuit apparently assumed that the District Court's order was interlocutory not only as to Petitioner Zekri, but as to Petitioners Brooks, Stephens, and Railey. On the face of its dismissal

order, the Eleventh Circuit did not address the effect of the district court's order striking the collective action allegations, staying a collective action over which it concluded it had no subject matter jurisdiction and which it believed did not exist, and compelling Petitioners —non-parties— to arbitrate.[1] (App., pgs. 1-2).

Had the District Court simply labeled its order a dismissal instead of a stay, questions regarding finality would not have arisen. Similarly, had the District Court explained the basis for continuing jurisdiction after compelling and resolving all issues relating to arbitration —if a basis for continuing jurisdiction existed— questions regarding finality would likely not have arisen.

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[1] The Eleventh Circuit cited *American Express Fin. Advisors v. Markarrewicz*, 122 F.3d 936, 939 (11th Cir. 1997), which was decided 3 years before this Court's decision in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000).

As a result of the District Court choosing to label its order a stay instead of a dismissal, Petitioners' assertion that the FLSA's collective action is substantive and not subject to contractual waiver was effectively rendered unreviewable. Petitioners' arguments regarding the collective action were certainly not frivolous as the Department of Labor has apparently taken the position that the FLSA's collective action provision is substantive, not procedural. (App., pgs. 43-74); *see also Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 349 n. 5 (4th Cir. 2008).

ARGUMENT – REASONS FOR ALLOWING THE WRIT

A. THE CIRCUITS ARE SPLIT ON WHETHER A DISTRICT COURT MUST DISMISS OR STAY AN ACTION AFTER ENTERING AN ORDER THAT COMPELS AND RESOLVES ALL CLAIMS RELATING TO ARBITRATION.

Because a dismissal is a final decision that confers appellate jurisdiction and a stay is not, the label attached to such a ruling has significant legal and practical consequences.

The Fifth, Sixth, and Ninth Circuits have held that the "weight of authority clearly supports dismissal when *all* of the issues raised in the district court must be submitted to arbitration." *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1165 (5th Cir. 1992)(emphasis in original and collecting cases); *Green v. Ameritech Corp.*, 200 F.3d 967, 973 (6th Cir.

2000); *Sparling v. Hoffman Const. Co., Inc.*, 864 F.2d 635, 638 (9th Cir. 1988).

The Third, Tenth, and Eleventh Circuit disagree. *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 268-270 (3d Cir. 2004)(Noting different resolutions by circuits and holding that district court has "no discretion to dismiss a case where one of the parties asks for a stay pending arbitration."); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994)(Vacating dismissal and remanding with directions to enter a stay); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir.1992)(Finding ". . . it was error to dismiss [claims] rather than staying them pending arbitration.").[2]

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[2] The result has created different rules in different circuits. For example, district courts in the Fifth Circuit are bound by circuit authority requiring them to dismiss rather than stay an action. By contrast, district courts in the Eleventh Circuit are bound by circuit authority requiring them to stay

In *Green Tree Financial v. Randolph*, 531 U.S. 79 (2000), this Court held that a ruling resolving all claims relating to arbitration is a "final decision" under 9 U.S.C. § 16(a)(3), which incorporates the same standard for finality as 28 U.S.C. § 1291. This Court applied a practical, not a technical approach to determinations of what constitutes a "final decision." *Green Tree*, 531 U.S. at 84; *Mohawk Indus. v. Carpenter*, No. 08-678, *slip op.* at 4, 558 U.S. –, 130 S.Ct. 599, 605 (2009)(The Court "'has long given' § 1291 a 'practical rather than a technical construction.'")[3]

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rather than dismiss the case. The national policy favoring arbitration is not served by the current state of the law making it easier for litigants in Texas and more difficult for Georgia litigants to appeal a ruling compelling arbitration of all claims.

[3] The need for direction to lower courts and litigants regarding the standard for a "final decision" is highlighted not only by unclear rulings but also because not all of the circuits have gotten this

In *Green Tree*, this Court elected not to address the relative merits of a district court's entering a stay instead of a dismissal. *Green Tree*, 531 U.S. at 87, n .2. The footnote indicates this Court declined to address and reserved the issue this petition addresses, *i.e.* whether a stay or dismissal must be entered when a court resolves all issues relating to arbitration.

Based on the holding and *dicta* in *Green Tree*, circuit courts and commentators have opined that district courts now have authority to decide appellate jurisdiction over an order compelling arbitration by simply labeling the order a "stay" or "dismissal." *ATAC Corp.*, 280 F.3d at 1100 (District courts are actually determining appellate jurisdiction for orders

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Court's message to give § 1291 "a practical rather than a technical construction." *ATAC Corp.*, 280 F.3d at 1099 ("This circuit has not adopted a test for appealability that hinges on the practical effect of a district court's order, and it will not do so now.")

compelling arbitration.); *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002)(Beseeching district courts to act responsibly in deciding appellate jurisdiction in arbitration cases.); *But see Napleton v. General Motors Corp.*, 138 F.3d 1209, 1213 (7th Cir. 1998)(Declining to "leave the jurisdictional trump card in the hand of the district court."); *see also* Pierre H. Bergeron, *District Courts as Gatekeepers? A New Vision of Appellate Jurisdiction Over Orders Compelling Arbitration*, 51 Emory L.J. 1365 (Fall 2002).

Petitioners do not contend that district courts lack authority to enter a stay under 9 U.S.C. § 3. However, because a stay presupposes a valid legal basis for the *continuing* exercise of jurisdiction, Petitioners assert that a district court must have a valid basis for continuing jurisdiction when entering a stay instead of a dismissal where its order resolves

all issues relating to arbitration. Petitioners contend that the *dicta* in *Green Tree* was merely an observation that entry of a *valid* stay —that is, one with a basis for continuing jurisdiction after all claims relating to arbitration have been resolved— is non-appealable.

The ruling by the District Court —though labeled a "stay"— if examined under a practical approach is not so much a "stay" as it is an order surrendering jurisdiction to a different tribunal. *See Moses H. Cone*, 460 U.S. at 10 n.11 ("A stay order is final when the sole purpose and effect of a stay are precisely to surrender jurisdiction of a federal suit to a state court.").

Petitioners assert that where, as here, a district court compels and resolves all issues relating to arbitration, it must dismiss, not stay, the case because the district court has no jurisdiction over the

other claims. The circuits are split on whether dismissal or a stay is proper.

B. This Case Presents Important Questions Of Federal Law That Have Not Been, But Should Be Settled By This Court

1. The Question Of Whether An Order Compelling And Resolving All Claims Relating To Arbitration is a "Final Decision" Remains Unsettled And Is An Important Issue Of Federal Law

The question of what constitutes a "final decision" is an important issue of federal law because it has significant legal and practical implications. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring) ("[The Court's]finality jurisprudence is sorely in need of further limiting principles . . . "); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)(Directing federal courts to "facilitate clarity" in dealing with issues involving jurisdiction); *Reed Elsevier, Inc. v. Muchnick*, No. 08-

103, *slip op.* at 5-7, 559 U.S. —, 130 S.Ct. 1237, 1243-244 (2010) (Discussing the need for clarity in matters involving jurisdiction); *Penn-West*, 369 F.3d at (Alito, J., dissenting)(Discussing the need for clarity regarding finality).

As with all matters involving the exercise of jurisdiction, after resolving all issues relating to arbitration, the district court should clearly set forth the basis for its continuing jurisdiction. *See* 16-108 Moore's Federal Practice - Civil § 108.04[1] (*Citing Mansfield & C.L.M. Ry. Co. v. Swan*, 111 U S. 379 (1884) for the familiar rule that the first duty of a court is to examine its own subject matter jurisdiction at "any stage in the proceedings."); *Freytag v. Commissioner*, 501 U.S. 868, 896 (1991)(Scalia, J., concurring in part and concurring in the judgment)("[Subject matter jurisdiction] may

be raised by a party, and indeed must be noticed *sua sponte* by a court, at all points in the litigation."

The rule that a federal court must examine its own subject matter jurisdiction at all points in the proceeding "springs from the nature and limits of the judicial power of the United States" and is "'inflexible and without exception . . . .'" *Steel Co v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998)(Scalia, J.)(*citing Mansfield*, 111 U.S. at 382).

That a court must dismiss a case when all matters relating to arbitration have been decided is simply a restatement of the familiar principle that "[j]urisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94. [4]

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[4] *Steel Co.* was a plurality decision where four members of this Court agreed that federal courts

In recent years this Court has made repeated efforts to clarify the question of what constitutes a "final decision" and what kinds of decisions truly implicate a federal court's jurisdiction. These issues involve important principles regarding the

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cannot reach the merits without first determining jurisdiction. One member of the Court stated that federal courts "typically should" decide jurisdiction before reaching the merits of any case. None of the five justices mentioned overruling *Mansfield*, which held that the rule requiring determination of jurisdiction before reaching the merits was "inflexible and without exception." Petitioners contend that the meaning of "inflexible and without exception" is clear and does not allow for "hypothetical jurisdiction." Based on *Mansfield*, *Steel Co.*, and *Green Tree*, Petitioners contend that district courts cannot exercise continuing jurisdiction (after resolving all claims relating to arbitration) based on the possibility that an issue relating to arbitration could arise in the future. Nor is it proper for a district court to retain jurisdiction based on the possibility or even likelihood that it may change its ruling in the future. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 291 (1988)(Scalia, J., concurring)("A categorical order . . . does not necessarily lose that status, and become 'non–final,' merely because the court may contemplate —or even, for that matter, invite— renewal of the aggrieved party's request for relief at a later date.")

separation of powers. The frequency with which this Court addresses similar issues confirm that the issues in this case as important matters of federal law. The fact that these issue arise in the context of arbitration —a favored national policy— makes it that much more clear that this case contains important questions of federal law worthy of consideration by this Court.

2. The Question Of Whether An Order Compelling And Resolving All Claims Relating To Arbitration is a "Final Decision" Significantly Affects the National Policy Favoring Arbitration

The national policy favoring arbitration of claims is well-established. In cases in which a district compels and resolves all issues relating to arbitration, federal courts should have clear direction as to whether they should dismiss or stay the action. From Petitioner's point of view, it is difficult to see how dismissing a case after compelling arbitration

contravenes the national policy favoring arbitration. Concerns that the circuits will be flooded with appeals are overstated. Sanctions under FED. R. CIV. P. 11, and FED. R. APP. P. 38, together with the well-established policy of summarily affirming insubstantial appeals, is more than sufficient incentive for litigants not to file frivolous appeals of orders compelling arbitration. Practical considerations, such as time and money, also suggest that courts will not be flooded with appeals of orders compelling arbitration.

Moreover, this Court's decision in *Green Tree Financial* made it plain that 9 USC § 16 incorporates the ordinary meaning of the term "final decision." *Green Tree*, 531 U.S. at 84. A decision is final under 9 U.S.C. § 16(a)(3) where a district court compels arbitration of all issues and there is nothing left for the court to do except execute the judgment. The

determination of finality under § 16(a)(3), like 28 USC § 1291, is a "practical, not a technical one." *Mohawk Indus.*, No. 08-678, *slip op.* at 4, 130 S.Ct. at 605.

Importantly, an order that resolves all of the issues relating to arbitration is a "final decision" regardless of whether the parties can later bring a separate proceeding to enter judgment, vacate or modify an arbitration award and does not "vitiate the finality of the District Court's resolution of the claims in the instant proceeding." *Green Tree Financial*, 531 U.S. at ___; *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 291 (1988)(Scalia, J., concurring)("A categorical order . . . does not necessarily lose that status, and become 'non–final,' merely because the court may contemplate —or even, for that matter, invite— renewal of the aggrieved party's request for relief at

a later date."). The possibility of future requests for relief is insufficient to confer jurisdiction or even ancillary jurisdiction. *Cf. Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 380 (1994)(Scalia, J.)("No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of case before a federal court.")

Thus, this Court's decisions, including *Green Tree* and *Kokkonen*, seem to preclude the most common reason lower courts' give for staying an action after resolving all issues relating to arbitration: the possibility of future proceedings. *See Adair*, 25 F.3d at 955 (A stay is required because "the likelihood of the presence of other issues is inherent."); The dissent in *Penn-West* is consistent with *Kokkonen* in that orders contemplating future

proceedings must permit reinstatement and, as a practical matter, specifically state why future proceedings are likely and explain why it is proper for the court to retain jurisdiction based on the possibility of future proceedings. *Penn-West*, 371 F.3d 130-134.

This Court's decision in *Green Tree* — characterizing an order compelling arbitration on all claims and dismissing the case as a "final decision" — did not contravene the national policy favoring arbitration. Nor does requiring a dismissal instead of a stay. A dismissal is a definite, firm statement that a case belongs in arbitration, while retaining jurisdiction by calling the ruling a stay indicates that the district court is perhaps less than sure of its decision resolving all issues relating to and compelling arbitration.

Even if characterizing such order resolving all claims relating to arbitration as a "final decision" is inconsistent with arbitration, the national policy favoring arbitration —a statutory policy— cannot trump "inflexible" Constitutional limitations on federal judicial power requiring subject matter jurisdiction at all points in the litigation.

The stay entered by the District Court in this case was as much a relinquishment of federal jurisdiction as the dismissal in *Green Tree* because in both instances the court disposed of all issues relating to arbitration and the litigants were "effectively out of court." *Moses H. Cone*, 460 U.S. at 28.

3. Under the Current State of the Law, District Courts have Been Afforded Authority to Decide Whether Appellate Jurisdiction Exists Over an Order that Compels and Resolves all Issues Relating to Arbitration

In *Moses H. Cone*, this Court held that a decision staying a federal action pending resolution of a state court suit amounts to a dismissal of the suit. This Court held that because the only substantive issue present in the federal suit was arbitrability, the issuance of the stay by the district court meant there would be no further litigation in the federal forum. Thus, there was nothing left for the district court to do and the parties were "effectively out of court."

There is no principled or functional difference between the stay entered by the District Court in this case and the stay entered in *Moses H. Cone*. Petitioners know of no statute or case authorizing a

district court to decide appellate jurisdiction by choosing to label its ruling a "stay" or "dismissal." A ruling, whatever the nomenclature, is final where there will be no further litigation in the federal forum and the litigants are "effectively out of court." *Moses H. Cone,*

If nomenclature is allowed to control the effect of a district court's order compelling and resolving all issues relating to arbitration, a district court could effectively prevent review of any order by labeling it as one "in abatement," thereby precluding *any* appellate review. *See* 28 U.S.C. § 2105. But nomenclature does not or should not control the important, practical question of whether a ruling is a "final decision."

Only Congress and, by designation, this Court are authorized to decide what constitutes a "final decision" for purposes of appellate jurisdiction.

Swint, 514 U.S. at 48.("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is "final" and when an interlocutory order is appealable warrant's the Judiciary's full respect.")

The current state of the law where district courts act as "gatekeepers" for appellate jurisdiction has been noted by courts and commentators. *ATAC Corp.*, 280 F.3d at 1099; *Salim Oleochemicals*, 278 F.3d at 93; *Napleton*, 138 F.3d at 1213; *see also* Bergeron, , 51 Emory L.J. 1365, *passim*.

Petitioners understand and respect that District Courts have a special role in the litigation process. But in instances where district courts have some discretion that influences their own jurisdiction, Congress or this Court has, at the very least, approved this discretion through statute or the rule making process. *See e.g.* FED. R. CIV.P. 54(b);

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 434-36 (1956). The discretion afforded district courts to decide whether a judgment as to some of the claims is final was intended as a procedural matter for efficient "judicial administration." FED. R. CIV. P. 54(b) presumes that a federal court has subject matter jurisdiction over all the claims, including those which were not included in the judgment and will be tried separately.

There is an ocean of difference between a district court's discretion to enter final judgment and continuing hear claims over which it has jurisdiction and this case where the District Court continued to exercise jurisdiction without pending claims.

B. THE DECISIONS BELOW ARE INCONSISTENT WITH THE NATIONAL POLICY FAVORING ARBITRATION.

At the time this statute was passed in 1925 and for years thereafter, courts understood that

"[a]rbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master or an "advisory" trial under [Rule 39]." *Murray Oil Products v. Mitsui & Co.*, 146 F.2d 381, 383 (2d Cir. 1944)(Hand, L., J.). Because arbitration was considered "merely a form of trial," an order compelling arbitration was not treated as a discontinuance of the case. *Murray Oil Products*, 146 F.2d at 382-83.

All that changed in 1956 when this Court specifically disagreed with the conclusion that arbitration was "merely a form of trial." *Bernhardt v. Ply graphic Co. of America, Inc.*, 350 U.S. 198, 203-04 (1956). This Court found that arbitration was a matter of substance, not procedure. *Bernhardt*, 350 U.S. at 207-08. (Frankfurter, J., concurring). This Court's subsequent decision in *Green Tree* reaffirmed that arbitration is a matter of substance, not

procedure. *Green Tree*, 531 U.S. at 85. (An order compelling and resolving all issues relating to arbitration is a disposition "of the entire case on the merits and [leaves] no part of it pending before the court.")

Allowing a district court to stay a case after resolving all issues relating to arbitration makes arbitration "merely a form of trial" contrary to *Bernhardt* and *Green Tree* and is fundamentally inconsistent with a series of decisions by this Court designed to "'revers[e] centuries of judicial hostility to arbitration agreements . . . ." *See e.g. Shearson/American Express v. McMahon*, 482 U.S. 220, 225 (1987). The retention of jurisdiction by a federal court over a case when all claims relating to arbitration have been resolved and arbitration compelled is an affront to the national policy favoring arbitration. Where a district court sends all issues to

arbitration, the retention of jurisdiction through a stay conveys uncertainty while a dismissal conveys the clearest support of a national policy favoring arbitration.

A federal court may not send some claims to arbitration but retain jurisdiction of a RICO claim based on "public policy" considerations. In the same vein, a federal court cannot retain jurisdiction over an FLSA claim it has referred to arbitration based on the general statement that "public policy" favors arbitration. The bottom line is that if a federal court has jurisdiction over pending claims, it must exercise it all but a very few exceptional circumstances. If, however, there are no pending claims over which a federal court has jurisdiction, it cannot retain jurisdiction and certainly should not do so by labeling its ruling a "stay" or anything else for that matter.

Dismissal of the case is what *Mansfield* has required for many years if at any point in the litigation there are no claims over which the federal court can exercise jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Attorney for Petitioners

April 19, 2011

TABLE OF APPENDICES

APPENDIX A — RULING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JANUARY 28, 2011 — APP, PGS. 1-2

APPENDIX B — ORDER AND RULING OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA DATED NOVEMBER 4, 2010 — APP., PGS. 3-11

APPENDIX C — THE **CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE, SET OUT VERBATIM WITH APPROPRIATE CITATION (SUP. CT. RULES 14(F) AND 14(I)(V)** — APP., PGS. 12-15

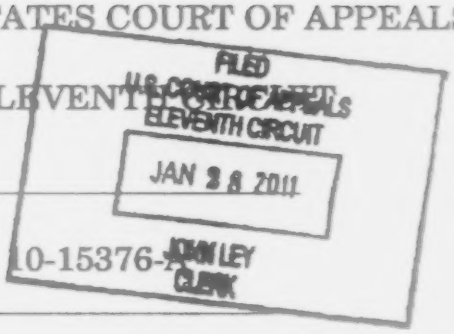
APPENDIX D — CIVIL DOCKET IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA — APP., PGS. 16-27

APPENDIX E — APP., PGS. 28-42
COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORCIA ON JUNE 7, 2010

APPENDIX F — APP., PGS., 43-74
PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND FOR RELATED RELIEF

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT



No. 10-15376-A

ABDOLLAH ZEKRI,
on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

Versus

MACY'S RETAIL HOLDINGS, INC.,
a New York corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, BLACK, and WILSON, Circuit Judges.

BY THE CO U R T:

This appeal is DISMISSED, *sua sponte,* for lack of jurisdiction. The district court's November 4,2010, order

compelling arbitration, striking class allegations, and staying the action pending arbitration, is neither a final nor appealable interlocutory order. *See* 28 U.S.C. § 1291; 9 U.S.C. § 16(b)(1) & (2); *American Express Financial Advisors, Inc.* v. *Makarewicz,* 122 F.3d 936,939 (11th Cir. 1997).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11 th ~ir.R. 27-2 and all other applicable rules.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ABDOLLAH ZEKRI, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

CIVIL ACTION NO.

1:10-cv-1740-MHS

v.

MACY'S RETAIL HOLDINGS, INC.,

Defendant.

ORDER

This action is before the Court on defendant's motion for an order (1) compelling arbitration on an individual basis; (2) striking class allegations; and (3) dismissing or, in the alternative, staying action pending arbitration. The Court's rulings are set out below.

Background

Plaintiff Abdollah Zekri, a former employee of defendant Macy's Retail Holdings, Inc. ("Macy's"), filed this action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., seeking to recover unpaid overtime

compensation, liquidated damages, and attorney's fees. Pursuant to 29 U.S.C. § 216(b), Zekri brought the action on behalf of himself and all other employees similarly situated.[1] Three additional individuals -Tamekia Brooks, Lillian Stephens, and Kenneth E. Railey -later filed consents to be party plaintiffs in the action.

Based on an arbitration agreement entered into by each of the plaintiffs, which requires claims to be arbitrated individually, Macy's moves to compel plaintiffs to arbitrate their claims on an individual basis, to strike their class allegations, and to dismiss or stay this action pending arbitration. Plaintiffs concede that they entered into the arbitration agreement, but they argue that the right to bring a collective action under Section 216(b) is a substantive right that cannot be waived. Plaintiffs also argue that the arbitration agreement is invalid and unenforceable under Georgia law because the waiver of the right to bring a collective action violates Georgia public policy and is too vague and indefinite.

[1] Section 216(b) provides in pertinent part: "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by anyone or more employees for and inbehalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b).

Discussion

Plaintiffs first argue that the right to bring a collective action under the FLSA is a substantive right that cannot be waived. This argument is without merit. In Gilmer v. Interstate/Johnson Lane Corp., 520 U.S. 20, 32 (1991), the Supreme Court rejected a similar argument regarding claims brought under theAge Discrimination in EmploymentAct ("ADEA'), whose collective action provision is adopted from the FLSA. See 29 U.S.C. § 626(b). Citing Gilmer, the Fifth Circuit subsequently held that the inability to proceed collectively in arbitration did not deprive claimants of substantive rights available under the FLSA. Carter v. Countrywide Credit Indus.. Inc., 362 F.3d 294,298 (5th Cir. 2004). The Fourth and Ninth Circuits have reached the same conclusion. See Adkins v. Labor Ready. Inc., 303 F.3d 496,503 (4th Cir. 2002)("[Plaintiffs] inability to bring a class action ... cannot by itself suffice to defeat the strong congressional preference for an arbitral forum."); Horenstein v. Mortlirage Market. Inc., 9 Fed. Appx. 618, 619 (9th Cir. 2001)("Appellants' contention that the arbitration cla use in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action, is insufficient to render an arbitration clause unenforceable.")

Eleventh Circuit case law also supports the conclusion that arbitration agreements may validly require waiver of statutory rights to bring class or collective actions. In Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005), the Eleventh Circuit compelled FLSA claims to arbitration over the plaintiffs' argument that the arbitration agreement's prohibition of collective actions was substantively unconscionable. Likewise, in Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868,878 (11th Cir. 2005), the court compelled the plaintiff to arbitrate individually her claims against a payday lender under Georgia's usury laws and Racketeer Influenced and Corrupt Organizations Act, holding that "the inclusion of a class action waiver in the Arbitration Agreements did not render those Agreements substantively unconscionable." And in Randolph v. Green Tree Fin. Corp., 244 F.3d 814,819 (11th Cir. 2001), the Eleventh Circuit held that "a contractual provision to arbitrate TILA [Truth in Lending Act] claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA."

Plaintiffs have cited no authority supporting their contention that the statutory right to bring a collective FLSA action cannot be waived. Hoffman-

La Roche. Inc. v. Sperling. 493 U.S. 165 (1989), on which plaintiffs rely, merely held that district courts in ADEA actions have discretion in appropriate cases to implement the provision for collective actions incorporated from the FLSA by facilitating notice to potential plaintiffs. Id., at 169. That case says nothing about whether the right to bring a collective action may be waived. Plaintiffs also cite cases holding that employees may not contractually waive their substantive remedies under the FLSA, but none of these cases hold that the right to bring a collective action is such a substantive remedy. Nor do any of the other cases cited by plaintiffs support their claim that the right to bring a collective action under Section 216(b) is a substantive right not subject to waiver.

Plaintiffs argue that the "opt-out" provision in Macy's arbitration program[2] is an invalid "contractual exhaustion" requirement. The Court disagrees. "Contractual exhaustion" refers to a requirement that employees exhaust contractual remedies before pursuing statutory remedies. Macy's opt-out provision does no such thing. It merely gives employees the choice of

[2] The opt-out provision gives new employees a limited time within which to opt out of the arbitration program if they choose. None of the plaintiffs in this case exercised their right to opt out of arbitration.

whether to resolve any employment disputes through arbitration rather than litigation. Even if they choose not to opt out of arbitration, employees are still entitled to pursue all the remedies provided for under the FLSA. They simply must do so in an arbitration proceeding rather than in court.

Plaintiffs also argue that the arbitration agreement's prohibition of collective actions is unconscionable because it violates Georgia public policy. This argument, however, is precluded by the Eleventh Circuit's decision in Caley, holding that such a prohibition is nether procedurally nor substantively unconscionable under Georgia law. 428 F.3d at 1377-78. Contrary to plaintiffs' contention, this case is unlike Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. 2007), in which the Eleventh Circuit held that a class action waiver was unconscionable. In Dale, "a remedy was effectively foreclosed because of the negligible amount of recovery when compared to the cost of bringing an arbitration action" and because attorney's fees and other costs were not recoverable. 498 F.3d at 1221-22. That is not the case here. There is no evidence that the amount of individual claimants' recoveries

would be negligible, and the arbitration agreement provides for the recovery of attorney's fees and costs.[3]

Finally, plaintiffs argue that the prohibition on collective actions is too vague and indefinite to be enforced. This argument is without merit. The Plan Document provides in relevant part as follows:

> The Arbitrator shall not consolidate claims of different Associates into one (1) proceeding. Nor shall the Arbitrator have the power to hear an arbitration as a class or collective action. (A class or collective action involves representative members of a large group, who claim to share a common interest, seeking relief on behalf of the group.)

Solutions InSTORE Plan Document, Art. II.f.ii. This language constitutes a clear and unambiguous waiver of an employee's right to bring a collective

[3] Plaintiffs claim that the arbitration agreement limits the amount of attorney's fees recoverable. The agreement, however, clearly provides that if an employee proves a violation of applicable law, "the Arbitrator shall have the same power and authority as would a judge to grant any relief, *including costs and attorney's fees*, that a court could grant, in conformance with applicable principles of common, decisional and statutory law in the relevant jurisdiction." Solutions InSTORE Plan Document, Art. 16 (emphasis added).

action in arbitration. See Johnson v. Carmax, Inc., No. 3:1O-CV-213, 2010 WL 2802478 at *3 (N.D. Va. July 14, 2010)(interpreting identical provision

as "mandat[ing] that the arbitration should be conducted on an individual, not collective basis").

Summary

For the foregoing reasons, the Court **GRANTS** plaintiffs' motion to exceed page limitation [#11]; **GRANTS** defendant's motion for an order compelling arbitration on an individual basis, striking class allegations, and dismissing or staying action pending arbitration [#7]; **STRIKES** plaintiffs' class allegations; and ORDERS the parties to proceed to arbitration on an individual basis in accordance with their agreement. Pursuant to 9 U.S.C. § 3, this action is **STAYED** pending arbitration, and the Clerk is **DIRECTED** to **ADMINISTRATIVELY CLOSE** this case.

IT IS SO ORDERED, this 4th day of November, 2010.

/s/_____
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE, SET OUT VERBATIM WITH APPROPRIATE CITATION (SUP. CT. RULES 14(F) AND 14(I)(V)

28 U.S.C. § 1291.

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and

1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

9 U.S.C. § 3.

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for

the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 16.

Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title [9 USCS § 3],

(B) denying a petition under section 4 of this title [9 USCS § 4] to order arbitration to proceed,

(C) denying an application under section 206 of this title [9 USCS § 206] to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title [9 USCS § 3];

(2) directing arbitration to proceed under section 4 of this title [9 USCS § 4];

(3) compelling arbitration under section 206 of this title [9 USCS § 206]; or

(4) refusing to enjoin an arbitration that is subject to this title.

U.S. District Court
Northern District of Georgia (Atlanta)
CIVIL DOCKET FOR CASE #: 1:10-cv-01740-MHS

Zekri v. Macy's Retail Holdings, Inc.	Date Filed: 06/07/2010
Assigned to: Judge Marvin H. Shoob	Date Terminated: 1110412010
Case in other court: USCA-11th Circuit, 10-15376-A	Jury Demand: Plaintiff
Cause: 29:216(b) Labor - Minimum wage or overtime compensation	Nature of Suit: 710 Labor: Fair Standards
	Jurisdiction: Federal Question
Plaintiff	represented by:
Abdollah Zekri *on behalf of himself and all others similarly situated*	**Stephen M. Katz** The Katz Law Group, LLC Suite 200 4799 Olde Towne Parkway Marietta, GA 30068 770-988-8181 Fax: 770-988-8182 Email: smkatz@smk-law.com *LEAD ATTORNEY ATTORNEY TO BE NOTICED*

V.

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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/07/2010	1	COMPLAINT with Jury Demand filed and summon(s) issued. Consent form to proceed before U.S. Magistrate and pretrial instructions provided. (Filing fee $350 receipt number 25120.), filed by Abdollah Zekri. (Attachments: # 1 Summons, # 2 Civil Cover Sheet)(cern) Please visit our website at http://www.gand.uscourts.govto obtain Pretrial Instructions. (Entered: 06/08/2010)

	2	NOTICE Of Filing Consents to be a Party Plaintiff by Abdollah Zekri (Katz, Stephen) (Entered: 06/22/2010)
	3	Consent MOTION for Extension of Time to File Answer re 1 Complaint, by Macy's Retail Holdings, Inc. (Attachments: # 1 Text of Proposed Order Proposed Consent Order)(Mehnnan, Leanne) (Entered: *06/23/2010)*
	4	CONSENT ORDER granting 1 Motion for Extension of Time to Answer or Otherwise Respond. Macy's Retail Holdings, Inc. shall have through and including 7/20/2010 within which to answer or otherwise respond. Signed by Judge Marvin H. Shoob on 06/28/2010. (rvb) (Entered: 06/28/2010)
07/20/2010	5	DOCUMENT FILING ERROR First MOTION to Compel 1. Arbitration on an Individual Basis; 2. Striking Class Allegation and 3. Dismissing or in the Alternative Staying Action Pending Arbitration with Brief In Support by Macy's Retail Holdings, Inc .. (Attachments: # 1 Exhibit Declaration of Noeth-Zekri, # ~ ExhibitA-B, # 1 Exhibit C-Q, #.1 Exhibit Declaration Noeth-Railey, # 2 Exhibit A-C, #6 Exhibit D-O, #7 Exhibit Noeth Declaration-Brooks,

		#8 Exhibit A-F, # 9 Exhibit Noeth Declaration-Stephens, # 10 Exhibit Exhibit A-F, # 11 Exhibit Declaration of Webb, # 12 Exhibit A-J, # 13 Exhibit K-L) (Mehnnan, Leanne) Modified on7/21/2010 (rvb). (Entered: 7/20/2010)
07/20/2010	6	DOCUMENT FILING ERROR First MOTION to Compel 1. Arbitration on an individual basis 2. striking class allegations and 3. dismissing or in the alternative staying action with Brief In Support by Macy's Retail Holdings, Inc. (Attachments: # 1 Brief in support of Motion to Compel, #2 Exhibit 1 # 1,#3 Exhibit A-B, # 4: Exhibit C-Q, #5. Exhibit 2, # .6 Exhibit A-C, #7 Exhibit D-O, #8 Exhibit 3, #9 Exhibit A-F, #10 Exhibit 4, #11 Exhibit A-F, #12 Exhibit 5, #13 Exhibit A-J, #14 Exhibit K-L)(Mehrman, Leanne) Modified on 7/21/2010 (rvb). (Entered: 07/20/2010)
07/20/2010	7	REDOCKETED MOTIONS 6 AS MOTION to Compel Arbitration on an Individual Basis, MOTION to Strike Class Allegations, MOTION to Dismiss, or, in the alternative, MOTION to Stay Action Pending Arbitration, with Brief In Support by Macy's Retail Holdings, Inc. (Attachments: # 1 Brief in Support,

		# 2 Exhibit 1 # 3 Exhibit A-B, #4 Exhibit C-Q, #5 Exhibit 2, #6, Exhibit A-C, # 7 Exhibit D-O, # 8. Exhibit 3, # 9. Exhibit A-F, # 10 Exhibit 4, # 11 Exhibit A--F, # 12 Exhibit 5, # 13 Exhibit A-J, # 14 Exhibit K-L)(rvb) Modified on 7/2112010 (rvb). (Entered: *07/21/2010)*
07/21/2010		Notification of Docket Correction re 6. First MOTION to Compel 1. Arbitration on an individual basis 2. striking class allegations and 3. dismissing or in the alternative staying action. Motion was filed as a single part motion. Motion Re-docketed as 4 part motion 1 MOTION to Compel Arbitration on an Individual Basis, MOTION to Strike Class Allegations, MOTION to Dismiss, or, in the Alternative, MOTION to Stay. (rvb) (Entered: 07/21/2010)
07/21/2010	**8**	NOTICE of Appearance by Raanon Gal on behalf of Macy's Retail Holdings, Inc. (Gal, Raanon) (Entered: *07/2112010)*
07/30/2010	**9**	Consent MOTION for Extension of Time File Response *to Defendant's Motion compelling arbitration* by Abdollah Zekri. (Attachments: # 1 Text of Proposed Order)(Katz, Stephen) (Entered: *07/3012010)*
08/2/2010	**10**	ORDER granting 2. Motion for Extension of Time until August

		13,2010 for Plaintiffs to file a response to defendant's motion compelling arbitration and related relief. Signed by Judge Marvin H. Shoob on *812/2010.* (tcc) (Entered: *08/03/20* I 0)
08/13/2010	**11**	MOTION for Leave to File Excess Pages by Abdollah Zekri. (Katz, Stephen) (Entered: *08/13/2010)*
08/13/2010	**12**	RESPONSE in Opposition re: 7 MOTION to Compel Arbitration on an Individual Basis MOTION to Srike MOTION to Dismiss MOTION to Stay filed by Abdollah Zekri. (Attachments: # 1 Appendix 1, # 2. Appendix 2, # 3. Appendix 3, # 4 Appendix 4, # 5 Appendix 5, # 6. Appendix 6, # 7 Appendix 7, # 8 Appendix 8, # 9 Appendix 9, # 10 Appendix 10, # 11 Appendix 11, # 12 Exhibit 1, # 13. Exhibit 2)(Katz, Stephen) (Entered: 08/13/2010)
08/18/2010	**13**	APPLICATION for Admission of Betty Tierney Pro Hac Vice (Application fee $ 150, receipt number I 13E-2855721)by Macy's Retail Holdings, Inc .. (Mehrman, Leanne) (Entered: *08/18/2010)*
08/23/2010	**14**	First Consent MOTION for Extension of Time reply to plaintiffs response in opposition re: 7 MOTION to Compel Arbitration on an Individual Basis MOTION to Strike MOTION to Dismiss

		MOTION to Stay by Macy's Retail Holdings, Inc. (Mehrman, Leanne) (Entered: 08/23/2010)
08/24/2010		RETURN of 13 APPLICATION for Admission of Betty Tierney Pro Hac Vice (Application fee $ 150, receipt number 113E-2855721)incorrect bar number for local counsel returned to attorney for correction. (bcg) (Entered: 08/24/2010)
08/25/2010	15	APPLICATION for Admission of Betty Tierney Pro Hac Vice by Macy's Retail Holdings, Inc .. (Mehrman, Leanne) (Entered: 08124/2010)
08/27/2010	16	CONSENT ORDER granting 14 Motion for Extension of Time to Reply to Plaintiffs Response in Opposition to Defendant's Motion to Compel, and all parties consenting hereto, it is hereby ordered that defendant shall have through and including September 10, 2010, to file its reply to Plaintiffs response in opposition to Defendant's motion to compel Arbitration, Striking Class Allegations and Dismissing, or in the Alternative, Staying Action Pending Arbitration. Signed by Judge Marvin H. Shoob on 08/24/2010. (rvb) (Entered: 08/26/2010)
08/27/2010		APPROVAL by Clerks Office re: 15

		APPLICATION for Admission of Betty Tierney Pro Hac Vice. Attorney Betty Thorne Tierney added appearing on behalf of Macy's Retail Holdings, Inc. (cdg) (Entered: *08/27/2010)*
8/27/2010	**17**	ORDER granting 15 Application for Admission Pro Hac Vice as to Betty Tierney. Approved by the Direction of the Court by CRD Janet S. Reed on 08/27/2010. (rvb) (Entered: *08/27/2010)*
08/31/2010	**18**	APPLICATION for Admission of Kevin May Pro Hac Vice (Application fee $150, receipt number 113E-2875489)by Macy's Retail Holdings, Inc .(Mehrman, Leanne) (Entered: 08/31/2010)
09/02/2010		Submission of 11 MOTION for Leave to File Excess Pages, submitted to District Judge Marvin H. Shoob. (rvb) (Entered: *09/0212010)*
09/03/2010	**19**	Corporate Disclosure Statement by Macy's Retail Holdings, Inc. identifying Corporate Parent Macy's Inc. for Macy's Retail Holdings, Inc. by Macy's Retail Holdings, Inc., (Mehrman, Leanne) (Entered: *09/03/2010)*
09/07/2010		Clerks Notation re 19 Corporate Disclosure Statement: approved by Judge Marvin H. Shoob on *09/07/2010.* (rvb) (Entered: *09/08/2010)*

09/10/2010		APPROVAL by Clerks Office re: 18 APPLICATION for Admission of Kevin May Pro Hac Vice (Application fee $150, receipt number 113E-2875489). Attorney Kevin C. May added appearing on behalf of Macy's Retail Holdings, Inc. (cdg) (Entered: *09/10/2010)*
09/10/2010	20	REPLY BRIEF re 7 MOTION to Compel Arbitration on an Individual Basis MOTION to Strike MOTION to Dismiss MOTION to Stay filed by Macy's Retail Holdings, Inc .. (Mehrman, Leanne) Modified on *9/13/2010* to delete duplicative text (rvb). (Entered: *09110/2010)*
09/13/2010	21	ORDER granting 18. Application for Admission Pro Hac Vice as to Kevin C. May. Approved by the Direction of the Court by CRD Janet S. Reed on 09/13/2010. (rvb) (Entered: 09/13/2010)
09/16/2010		Submission ofl MOTION to Compel Arbitration on an Individual Basis, MOTION to Strike, MOTION to Dismiss, MOTION to Stay, submitted to District Judge Marvin H. Shoob. (rvb) (Entered: 09/16/2010*)*
10/18/2010	22	Notice for Leave of Absence for the following date(s): *11/6/10, 11/7/10,* 11/811 0, *11/9/10, 11/10/10,* 11/11/10, 11/12/1 0, *11/13/10,* by Stephen M. Katz.

		(Katz, Stephen) (Entered: *10/18/2010*)
11/04/2010	**23**	ORDER granting 11 Motion for Leave to File Excess Pages. The Court grants Defendant's 7 Motion for an Order to Compel arbitration on an individual basis, striking class allegations, and dismissing or staying pending arbitration. The Court strikes Plaintiffs' class allegations and orders the parties to proceed to arbitration on an individual basis in accordance with their agreement. This action is stayed pending arbitration and the Clerk is directed to administratively close this case. Signed by Judge Marvin H. Shoob on 11/04/2010. (rvb) (Entered: 11/04/2010)
11/04/2010		Civil Case Terminated. (rvb) (Entered: 11/04/2010)
11/17/2010	**24**	NOTICE OF APPEAL as to 23 Order on Motion to Compel, Order on Motion to Strike, Order on Motion to Dismiss, Order on Motion to Stay, Order on Motion for Leave to File Excess Pages,,,,,,,by Abdollah Zekri. Transcript Order Form due on 12/112010 (Katz, Stephen) (Entered: 11/17/2010)
11/19/2010	**25**	Transmission of Certified Copy of Notice of Appeal, Order and Docket Sheet to US Court of Appeals re: 24

		Notice of Appeal. (kac) (Entered: *11119/2010)*
11/22/2010		USCA Appeal Fees received $455.00; Receipt number 113E-3010307 re: 24 Notice of Appeal filed by Abdollah Zekri. Case Appealed to USCA - 11th Circuit. USCA Case Number 10-15376-A. (kac) (Entered: 12/2112010)
12/02/2010	**26**	USCA Acknowledgment of 24 Notice of Appeal filed by Abdollah Zekri. Case Appealed to USCA - 11th Circuit. USCA Case Number 10-15376-A. (kac) (Entered: 12/06/2010*)*
12/21/2010	**27**	Forwarded certified copy of docket sheets reflecting payment of appeal filing and docketing fees to USCA re: 24 Notice of Appeal filed by Abdollah Zekri.Case Appealed to USCA - 11th Circuit. USCA Case Number 10-15376-A. (kac) (Entered: 1212112010)
12/30/2010	**28**	USCA Acknowledgment of USCA Appeal Fees re: 24 Notice of Appeal, filed by Abdollah Zekri. Case Appealed to USCA- 11th Circuit. Case Number 10-15376-A. (pjm) (Entered: 01/04/2011*)*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLERK'S OFFICE
JAN 07 2010

ABDOLLAH ZEKRI, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	Civil Action File No. 1 10-CV-174 -MHS
vs.	:	
MACY'S RETAIL HOLDINGS, INC., a New York corporation,	:	
Defendants.	:	

COMPLAINT

Plaintiff Abdollah Zekri, on behalf of

himself and all others similarly situated (hereinafter "**Plaintiff**" or "**Zekri**"), through his counsel, Stephen M. Katz, for his Complaint, respectfully show as follows:

NATURE OF THIS ACTION

1.

This is an action brought under the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* (hereinafter, "**FLSA**") to recover unpaid overtime compensation, double damages, and attorneys fees.

PARTIES

2.

ZEKRI, the named Plaintiff in this action, is an individual living in the Northern District of Georgia.

3.

Macy's Retail Holdings, Inc. (hereinafter "**Defendant**" or "**Macy's**") is a corporation which, at all times relevant hereto, maintained operations in the State of Georgia, and transacted regular, not isolated, acts of business within this judicial district, metropolitan Atlanta, Georgia as well as nationally.

4.

Macy's can be served by delivering a copy of the summons and complaint to its registered agent, Corporation Service Company, 40 Technology Parkway South #300, Norcross, Georgia 30092.

5.

Defendant is engaged in commerce as defined under the FLSA at 29 U.S.C. § 203(b).

6.

Defendant is an "enterprise engaged in commerce or in the production of goods or services for commerce" pursuant to the FLSA, 29 U.S.C. § 201 *et. seq.*

7.

At all relevant times, Defendant has been and remains, an Employer as defined under the FLSA at 29 U.S.C. § 203(d) in that it acted ". . . directly or indirectly in the interest of an employer in relation to an employee. . ."

8.

As an employer engaged in commerce, Defendant is subject to the requirements of the FLSA, 29 U.S.C. §201 *et. seq.*

JURISDICTION

9.

Jurisdiction over this action is conferred on this Court by §216(b) of the FLSA as well as

28 U.S.C. §1331.

VENUE

10.

Venue is proper in the Northern District of Georgia in that all of the acts complained of took place in this judicial district.

FACTS

11.

Plaintiff was employed by Macy's under the title of "sales manager" and was so employed within the preceding five (5) years.

12.

Plaintiff's job title was misclassified as a manager because Plaintiff's job duties while

employed by Defendant consisted primarily of customer service related sales and managing merchandise i.e. serving customers, stocking shelves, loading and unloading boxes.

13.

Plaintiff did not have discretionary authority in his position.

14.

While employed by Defendant, Plaintiff and the putative class of individuals have consistently worked over 40 hours per week. Plaintiff and the putative class members are similarly situated in terms of pay and compensation.

15.

Defendant never provided Zekri or members of the putative class with overtime compensation for hours worked in excess of 40 hours in a workweek.

16.

Plaintiff has worked not less than an average of 65-70 hours per week for the preceding four (4) years.

CLAIM FOR RELIEF
VIOLATION OF 29 U.S.C. § 216(b)
(FLSA)

COUNT I

17.

Plaintiff repeats and realleges each and every paragraph set forth in paragraphs 1 to 16 as if fully set forth at length herein.

18.

Defendant repeatedly and willfully violated the provisions of §§7 and §§15(a)(2) of the FLSA, 29 U.S.C. §207 and §215(a)(2) by employing employees, including Plaintiff, engaged in commerce or in the production of

goods for commerce, for work weeks longer than 40 hours without compensating such employees for their employment in excess of such hours at rates not less than one and one-half times the regular rates at which they were employed.

19.

Plaintiff, as well as those similarly situated to him, were regularly compelled to work more than 40 hours per week but were and are not paid overtime compensation as required under the FLSA.

20.

Plaintiff, and those similarly situated to him are not exempt employees under the FLSA; thus, Defendant was required to pay them

overtime compensation for all hours worked each week in excess of 40.

21.

Defendant's violations of the overtime pay requirements set forth in the FLSA were systematic, voluntary and willful.

22.

Defendant owes the named Plaintiff, and those similarly situated to him, overtime pay for work performed but not compensated in an amount to be determined in this collective action, plus liquidated damages in an equal amount pursuant to 29 U.S.C. §216(b).

COUNT II

23.

Plaintiff incorporates the allegations contained in paragraphs 1 through 22 of this complaint as though the same were fully set forth at length herein.

24.

Within the preceding two years, Defendant, an employer subject to the provisions of the FLSA, repeatedly violated the provisions of §§11(c) and §§15(a)(5) of the FLSA, 29 U.S.C. §211(c) and §215(a)(5) and the Department of Labor regulations at 29 C.F.R. §516 by failing to make, keep and preserve adequate and accurate records of the persons

employed and of the wages, hours, and other conditions and practices of employment maintained by them.

25.

Plaintiff is entitled to relief, shifting the burden of proof to Defendant with regard to the amount of overtime worked due to the violation of §§11(c) and §§15(a)(5) of the FLSA, 29 U.S.C. §211(c) and §215(a)(5) and the Department of Labor regulations at 29 C.F.R. §516.

WHEREFORE, Plaintiff demands relief as follows:

1. That process issue and that Defendant be served according to law;

2. An Order finding that Defendant violated §215(a)(2) and §216(b) of the FLSA;

3. Judgment in favor of Plaintiff and all those similarly situated to him and against Defendant for unpaid overtime compensation together with double damages;

4. Pursuant to §216(b) of the FLSA, judgment in favor of Plaintiff and those similarly situated to him and against Defendant for reasonable attorneys fees;

5. Judgment in favor of Plaintiff and those similarly situated to him and against the Defendant for prejudgment interest;

6. Judgment in favor of Plaintiff and

those similarly situated to him and against the Defendant for all taxable and non-taxable costs;

7. Pursuant to the Seventh Amendment to the United States Constitution and Rule 38, F.R.Civ.P., **TRIAL BY JURY** on all claims on which a jury trial is available;

8. Such other, further and different relief as this Court deems appropriate.

This 4th day of June, 2010.

Respectfully submitted,
By:/**s/ Stephen M. Katz**
Stephen M. Katz
Ga. Bar No. 409065

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ABDOLLAH ZEKRI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	)
PLAINTIFF,	)CIVIL ACTION VS.)No.1:10-CV-1740
MACY'S RETAIL HOLDINGS, INC., A NEW YORK CORPORATION,	)
DEFENDANT.	)

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND FOR RELATED RELIEF

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ISSUES

1. The first issue before the Court is matter of first impression in the Eleventh Circuit: Whether the collective action remedy under section 216(b) of the Fair Labor Standards Act is substantive and therefore non-waivable?

2. The second issue is: Whether the purported § 216(b) waiver in Macy's arbitration program is invalid under Georgia law?

I. BACKGROUND AND FACTS

On June 7, 2010, Abdollah Zekri filed this collective action FLSA overtime case on behalf of himself and other similarly situated employees of Macy's Retail Holdings, Inc. Zekri and the putative opt-in plaintiffs[1], seek to recover unpaid overtime, liquidated damages, and attorneys fees (Complaint, ¶ 1). Plaintiffs filed this case as a collective action, a remedy explicitly and purposely contained in section 16(b) of the FLSA, 29 U.S.C§ 216(b) (hereafter "§ 216(b)").

Plaintiffs were employed by Macy's under the title, "Sales Managers." The job title "Sales Manager" is a misclassification because the position carries no discretionary authority. The duties consist of customer service related sales and managing merchandise, specifically, waiting on customers, stocking shelves, loading and unloading boxes, ringing registers. Macy's, paid Plaintiffs an annual salary but consistently required them to work over 40 hours per week without overtime compensation.

Macy's requires employees to arbitrate disputes as a condition of employment. Under the terms of Macy's arbitration program, called "DRP," employees must arbitrate all "covered" disputes, which include overtime claims. (Exhibit 1). Macy's

[1] Tamekia Brooks, Lillian Stephens, and Kenneth E. Railey.

arbitration program expressly provides that the arbitrator does not have the power to hear cases as a collective or class actions. (Exhibit 1, "Plan Document" page 13). Nowhere does Macy's arbitration program state that employees cannot bring collective actions. *Id., passim*.

Zekri's argument is not with arbitration, but with Macy's attempt to obtain contractual waiver of the § 216(b) collective action remedy. Had Macy's arbitration agreement contained a provision that did not waive FLSA collective actions, Plaintiffs would have proceeded to arbitration of their FLSA collective action. *See e.g. Gentry v. Superior Court of Los Angeles*, 42 Cal.4th 443, 165 P.3d 556, 64 CalRptr.3d 773 (2007) ("class arbitration [is] a well-accepted alternative to class litigation on the one hand and individual arbitration on the other" for overtime claims) Macy's provides no explanation why its arbitration program cannot provide for arbitration of collective actions.

Macy's contends that the "opt out" requirement in its arbitration program ---allowed on a one-time basis for 30 days at the beginning of their employment-- is not a waiver of § 216(b) bring collective action remedy. Plaintiffs assert that forcing employees to "opt out" of arbitration before they can "opt in" to a collective action is an invalid "contractual exhaustion" requirement that, contrary to the statute, effectively makes it impossible to bring a collective action. The one time, "opt out" requirement imposed by Macy's arbitration program impermissibly burdens FLSA collective actions by adding a Rule 23 class action (opt-out) procedure, an

additional requirement not present in the FLSA's remedial scheme. In fact, federal courts have consistently held the class action "opt out" procedures cannot be applied to FLSA collective actions.

On July 20, 2010, Macy's responded to this FLSA collective action by moving for an order "(1) Compelling Arbitration On An Individual Basis," and "(2) Striking Class Allegations. . .(sic).[2]" Zekri's response is straightforward: a § 216(b) collective action can be heard by a court. Or, if the parties agree, a § 216(b) collective action can be heard by an arbitrator instead of a court. But an employer cannot use an arbitration program to force employees to waive their right to bring § 216(b) collective actions.

Plaintiffs assert additional arguments that Macy's arbitration program is unenforceable under Georgia law.

II. ARGUMENT AND CITATION OF AUTHORITY

A. CONTRACTUAL WAIVERS OF THE FLSA'S REMEDIAL PROVISIONS ARE NOT PERMITTED; AN EMPLOYER CANNOT OBTAIN A "BACK DOOR" WAIVER OF THE REMEDIES IN § 216(B) OF THE FLSA THROUGH AGREEMENTS TO ARBITRATE

[2] In its motion, Macy's erroneously refers to Plaintiffs' action as containing "class" allegations. Plaintiffs have asserted their overtime claims as a collective, not a class action.

None of the FLSA rights in § 216(b) can be abridged by contract or otherwise waived. *Rock v. Anthony Int'l, LLC*, 2010 U.S. App. LEXIS 10775, n.2 at *7 (11th Cir. May 26, 2010)("FLSA rights cannot be waived"); *Lynn's Food Stores, Inc. v. DOL*, 679 F.2d 1350, 1352-1353 (11th Cir. 1982)("Congress made the FLSA's provisions mandatory; thus, the provisions are not subject to negotiation or bargaining between employers and employees. [cite omitted] "FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.")

Year after year, in case after case, the Supreme Court, Eleventh Circuit and virtually all other federal courts have consistently refused to permit contractual waiver of any of the remedial provisions set forth in § 216(b): **Liquidated Damages**. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) (". . . waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."); **Right to Overtime (Coverage).** D.*A. Schulte v. Gangi*, 328 U.S. 108 (1946) and *Dees v. Hydradry, Inc.*, 2010 U.S. Dist. LEXIS 40900 (M.D. Fla. 2010); **Regular and Overtime Rate of Pay**. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944) and Herman v. City of St. Petersburg, 131 F.Supp.2d 1329 (M.D. Fla. 2001); **Attorneys' Fees**. *Silva v. Miller*, 307 Fed.Appx 349 (11th Cir. 2009), *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 299 n.1 (5th Cir. 2004) and *Almodova v. City and County of Honolulu*, 2010

U.S. Dist. LEXI2 33199 (D. Hawaii 2010);
Collective Action. *Hoffman-La Rouche v. Sperling*, 493 U.S. 165 (1989)(Holding that the right to bring an FLSA collective action is an affirmative remedy, a policy of Congress that must be enforced to "the full extent of its terms," and that procedural remedies are derived from, not created by § 216(b)'s collective action provision)

The reason FLSA collective action remedy is not waivable is the same reason why collective actions were placed in the statute as a substantive part of the § 216(b) remedy: unequal bargaining power of employers and employees. *Lynn's Food Stores*, 679 F.2d at 1352, n.5. Waiver of the remedies under § 216(b) is not permitted so that the public interest will not become a casualty of the unequal bargaining power between employers and employees, the evil the statute was designed to eradicate. *Brooklyn Savings Bank*, 324 U.S. at 706-707. ("The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result free movement of goods in interstate commerce."); *Rock*, 2010 U.S. App. LEXIS 10775, n.2 at *7; *Lynn's Food Stores*, 679 F.2d at 1352, n.5.

The Federal Arbitration Act (FAA) was passed to place contracts for arbitration on the same footing as other contracts. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2010 U.S. LEXIS 5255 (2010). Though arbitration is favored, the Supreme

Court has "never held that this policy overrides the principle that a court may submit to arbitration "only those disputes . . . that the parties have agreed to submit." Id. The intent of the contracting parties and general contract defenses, such as fraud, duress, or unconscionability trump the policy favoring arbitration. *See e.g. Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007); *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287 (11th Cir. 2002). The national policy favoring arbitration is, for lack of a better analogy, an affirmative action plan designed to reverse "the judiciary's longstanding refusal to enforce agreements to arbitrate." *Granite Rock Co.*, 2010 U.S. LEXIS 5255 at *30. Placing arbitration contracts on the "same footing" as other contracts does not make arbitration contracts superior to other contracts, nor does it invalidate long-standing contract-law principles, nor does it magically permit waiver of claims the underlying statute has made non-waivable.

Arbitration contracts do not reverse long-standing legal authority that § 216(b) remedies are non-waivable, nor do arbitration contracts provide a "back door" method for employers to obtain employee waivers of rights under § 216(b). A party agreeing to arbitration does not waive or forego any substantive statutory right offered in the underlying statute. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than a judicial, forum.");*Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985); *see also Cole v. Burns Int'l Security Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997).

Macy's attempts to pass off the waiver of the collective action remedy in § 216(b) as a procedural technicality is contrary to the statute and overwhelming weight of legal authority. The right to bring a collective action under the FLSA is a substantive, non-waivable right twice enacted by Congress. The Supreme Court recognizes the right to bring a collective action as a substantive remedy included in § 216(b) that "must be enforced to the full extent of its terms." The Eleventh Circuit and this Court have both recognized § 216(b) as substantive, a policy of Congress. The U.S. Department of Labor recognizes collective actions as a substantive, non-waivable right. Zekri and the other plaintiffs' argument is not with arbitration, but with Macy's attempt to obtain contractual waiver of a § 216(b) remedy specifically and twice enacted by Congress to effectuate the purpose of the FLSA.

B. Congress Made It Plain, And The Supreme Court Has Confirmed, That The Collective Action Remedy In § 216(B) Of The FLSA Is A Substantive Statutory, Remedial Right, Which Must Be "Enforced To The Full Extent Of Its Terms"

1. Collective Action By Employees Was A Critical Element Of The FLSA From The Beginning

On July 6, 1937, after extensive congressional hearings, then Senator Hugo Black, the law's primary sponsor, introduced the first version of the FLSA. Affirming collective action as essential to

the statute was the first thing out of Sen. Black's mouth in his very first report to the Senate. S. Rep. No. 884, 75th Cong., 1st Sess. pgs. 3-4 (1937)(Appendix A, Doc. 3). The first statements made by Senator Black's his first report to the Senate made it plain that collective action by employees was essential to the FLSA because of the bargaining weakness of employees. *Id.*

On June 11, 1938, the Senate and House issued a Conference Report, with the collective action provision written into § 216(b), together with back wages, liquidated damages, costs, and attorney's fees. H.R. Rep. No. 2738, 75th Cong., 3d. Sess., at 1 to 12 (1938)(Appdx. A, Doc. 4). The Conference Report and all of the other legislative history establishes Congress enacted the FLSA to aid unprotected, unorganized and the lowest paid employees who lacked significant bargaining power to secure for themselves a minimum subsistence wage. *Brooklyn Savings Bank*, 324 U.S. at 708, n.18, 65 S.Ct. at 903 citing 81 Cong.Rec. 7672, 7885 (Appdx. A, Doc. 5), 82 Cong.Rec. 1386, 1395, 1491, 1505 (Appdx. A, Doc. 6); 83 Cong.Rec. 7283, 7298, 9260, 9265 (Appdx. A, Doc. 7); H.R. Rep. 1452, 75th Cong. 1st Sess., pp. 3-4 (1937)(Appdx. A, Doc. 8). In enacting the FLSA, it is beyond dispute that Congress intended to protect those workers who were not benefitted by collective bargaining agreements. Those who contend that the collective action remedy is merely procedural must explain how the lowest paid, unprotected, unorganized (not benefitted by collective bargaining) workers can effectively vindicate their rights without availability of a collective action. The collective action provision was

essential to effectuate the statute and Congress' policy.

The debate after the Conference Report and before enactment of the FLSA left no doubt that inclusion of the collective action provision was a substantive, critical part of the remedies in § 216(b) to encourage collective action FLSA actions due to unequal bargaining power of those the statute was designed to protect and to limit the amount and cost of administrative enforcement by the federal government:

> Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation. The bill has other penalties for violations and other

> judicial remedies, but the provision which I have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act.

83 Cong. Rec. 9264 (1938)(Appdx. A, Doc. 9); *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1264 (11th Cir. 2008) (The first purpose of an FLSA collective action is to reduce the burden on the plaintiff); *Helton v. K-Mart*, Civil Action File No. 1:92-cv-2564-MHS set forth in Exhibit A to *Grayson v. K-Mart*, 79 F.3d 1086, 1109 (11th Cir. 1996) ("Congress has stated its policy that [FLSA] plaintiffs should have the opportunity to proceed collectively. A collective action allows [FLSA] age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.")

That collective actions were essential to enforcement of this landmark legislation was clear before and after enactment of the FLSA because employees, using collective and other actions, would serve as the primary method of enforcing the FLSA. *Brooklyn Savings Bank*, 324 U.S. at 706, n. 16, 65 S.Ct. at 902; see also H.R. Rep. No. 2738, 75th Cong., 3d. Sess., at 29 (1938)(Appdx. A Doc. 4)(Noting that FLSA contained minimal administrative machinery for enforcement); see

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)("For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, Congress chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied.");[3]

[3] Commentators at the time understood that Congress made employees the primary enforcement vehicle. Samuel Herman, The Administration and Enforcement of The Fair Labor Standards Act, 6 Law & Contemp. Probs. 368, 376 (1939) (In passing the FLSA, Congress understood that the range of DOL's regulatory activity, "together with the limited resources of the Wage and Hour Division, would make adequate administration impractical, if not virtually impossible, without the aid of outside sources."); Id. at 385 (Due to DOL's limited resources, it was employees and unions affected by the law that ensured adequate enforcement machinery was set up). DOL resources to enforce the FLSA remain extremely limited to this day. See GAO, Employee Misclassification, GAO Rept. 09-717 at 16 (Washington, D.C.: August 10, 2009)("WHD [Wage & Hour Division] officials told us that their ability to conduct targeted investigations in recent years has been limited by reductions in agency resources combined with consistently high levels of workercomplaints about possible labor law violations."); GAO, Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance, GAO-08-962T (Washington, D.C.: July 15, 2008); Department of

It remains clear to courts today that Congress has designed a remedial scheme that depends on employees for enforcement. *Morgan*, 551 F.3d at 1264 ;(The first purpose of an FLSA collective action is to reduce the burden on the plaintiff); *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 585 F.3d 310, 316 (7th Cir. 2009) (Rovner, J., dissenting), *citing Mitchell, supra*.

2. In Passing The Portal-To-Portal Act Of 1947, Congress Reenacted And Reaffirmed The Critical Importance Of Collective Actions By Employees, Using The Identical Language Used By The 75th Congress In 1938

In passing the The Portal-to-Portal Act of 1947, 52 Stat. 1060, Congress reaffirmed the critical, central role of FLSA collective actions. In that enactment, Congress modified the collective action to eliminate non-employees from acting as representatives. Importantly, in making the modification, the 80th Congress repeated and re-enact the collective action language used by the 75th

Labor: Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft, GAO-09-458T (Washington, D.C.: Mar. 25, 2009); and Department of Labor:Wage and Hour Division Needs Improved Investigative Processes and Ability to SuspendStatute of Limitations to Better Protect Workers Against Wage Theft, GAO-09-629 (Washington, D.C.: July 23, 2009).

Congress in 1938 to make it clear there was no retreat whatsoever from the premise that collective actions were essential to effectuate the purpose of the statute. (*Compare* Appdx. A, Doc. 1 *with* Appendix A, Doc. 2); 93 Cong. Rec. 2300, 2361, 2362, 2364. (Appdx. A, Doc. 10). In its analysis of The Portal-to-Portal Act, the Supreme Court agreed. *Hoffman-La Rouche*, 493 U.S. at 173.

The only change in the collective action provision was to prohibit individuals or entities other than employees from acting as representatives. Statements by the sponsors of The Portal-to-Portal Act made it clear that the 80th Congress was reaffirming the critical importance of FLSA collective actions by employees. A subsequent Congress' enactment of the same language of a statute is entitled to "great weight." *South Carolina v. Regan*, 465 U.S. 367 (1984)("[subsequent] legislation declaring the intent of an earlier statute is entitled to great weight." *citing Lion Broadcasing, Inc. v. FCC*, 395 U.S. 367 (1969); *Branch v. Smith*, 538 U.S. 254 (2003).[4]

[4] Only the enactments of a subsequent Congress on the same subject matter is entitled to "great weight." *Regan*, 465 U.S. at 380, 104 S. Ct. at 1115. Statements of a subsequent Congress in committee reports, the Congressional Record, the Press, and other places are not entitled to great weight. Ironically, The 80th Congress not only re-stated but actually strengthened the FLSA collective action provision when it enacted The Portal-To-Portal Act by not only re-enacting using the same collective action language, but by adding

3. After Examining The Language Of The Remedial Provision, The Statutory Framework As A Whole, And The Legislative History Of The FLSA, The Supreme Court Held That The Collective Action Remedy In §216(B) Is A Substantive Remedy, A Policy Of Congress That Must Be "Enforced To The Full Extent Of Its Terms"

It is not surprising that in light of the statute's legislative history, the Supreme Court held that collective actions were a affirmative right, a policy of Congress that must be "enforced to the full extent of its terms." *Hoffman-LaRoche*, 493 U.S. at 170 (1989). In *Hoffman-La Rouche*, 42 years after The Portal-to Portal Act, the Supreme Court paved the way for district courts to facilitate sending notice of the collective action to similarly situated employees to effectuate Congress' policy on FLSA collective actions. Granting employees access to the federal courts to facilitate notice to similarly situated individuals demonstrates that the Supreme Court did not view the § 216(b) collective action remedy as merely "procedural." The Supreme Court made it plain that the § 216(b) collective action was a substantive remedy from which procedural remedies were "derived." *Hoffman-La Rouche*, 493 U.S. at 176

parenthetical language making it plain that collective actions could be brought by employees against public agencies as well as private employers. The re-enactment of the FLSA collective action provision is entitled to "great weight."

(Scalia, J. dissenting). If giving district courts the power, if not the duty, to facilitate notice was merely procedural or not pursuant to policy of Congress in enacting the statute, then the Supreme Court's decision in Hoffman-La Rouche is unconstitutional as Justice Scalia argued in his dissent. *Hoffman-La Rouche*, 493 U.S. at 176 (Scalia, J., dissenting). If giving district courts power to facilitate notice was merely procedural, then the Supreme Court was, as Justice Scalia argued, engaging in the disreputable practice of "stirring up litigation." *Hoffman-La Rouche*, 493 U.S. at 181 (Scalia, J., dissenting). Justice Scalia had it right: holding that district courts have the power, if not the duty, to facilitate notice in FLSA cases was far more than a "routine exercise of case management." *Hoffman-La Rouche*, 493 U.S. at 174 (Scalia, J., dissenting). Zekri contends that after *Hoffman-La Rouche*, it is too late in the day to argue that § 216(b)'s collective action remedy is merely procedural.

This Court is, of course, no stranger to the question of whether the right to proceed collectively is a substantive right under the FLSA. *Helton v. K-Mart Corp.*, Civil Action File No. 1:92-cv-2564-MHS. In a decision now routinely cited in collective actions, the Eleventh Circuit affirmed *Helton, sub nom., in Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996). The Eleventh Circuit attached this Court's order in *Helton* as Exhibit A to the Grayson opinion. Grayson, 79 F.3d at 1108. In *Helton*, this Court stated "'Congress has stated its policy that ADEA [ADEA incorporates the FLSA collective action remedy] plaintiffs should have the opportunity to proceed collectively. A collective action allows [FLSA

and ADEA] plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.'" *Grayson*, 79 F.3d at 1109. Zekri contends that this Court's statement was completely consistent with *Hoffman-La Rouche* and the legislative history set forth above.

Grayson and *Helton* are instructive on the question of whether the collective action remedy in § 216(b) is a substantive, non-waivable remedy. In Helton, this Court asked the parties to brief 5 questions. The first question was "Whether the "similarly situated" requirement of 29 U.S.C. § 216(b) is essentially the same as the requirement for joinder of additional plaintiffs under Fed. R.Civ.P. 20 and 42?" When it decided *Grayson*, the Eleventh Circuit devoted a considerable part, perhaps a majority, of its opinion to these 5 questions, including question 1. Grayson, 79 F.3d at 1093.

Had *Grayson* held that the § 216(b) collective action standard was simply the same standard as Fed R. Civ.P. 20 and 42, then Macy's argument that the collective action remedy is merely procedural would perhaps be plausible. But Macy's argument fails because in Grayson, the Eleventh Circuit held that ". . . § 216(b)'s "similarly situated" requirement is less stringent than that for joinder under Rule 20(a) or for separate trials under Rule 42(b)." Grayson, 79 F.3d at 1096.
In enacting § 216(b), Congress created a collective action standard that is minimal, if not easy to meet, which makes clear that Congress wanted to effectuate a substantive, affirmative remedial policy in favor of collective actions. Justice Scalia

understood this argument and asserted in dissent that § 216(b)'s collective action remedy was merely procedural, the same as that under F.R.Civ.P. 20(a). *Hoffman-La Rouche,* 493 U.S. at 178 (Scalia, J., dissenting). In *Helton,* this Court correctly held, and the Eleventh Circuit agreed, that the majority opinion in Hoffman-La Rouche rejected the argument that § 216(b) collective action remedy was equivalent to F.R.Civ.P. 20(a) and 42. Grayson, 79 F.3d at 1108-1111.

5. The United States Department Of Labor Has Determined That The Collective Action Remedy In § 216(B) Is "Substantive And Non-Waivable"

In *Long John Silver's Restaurants v. Cole*, 388 F.Supp.2d 644 (D. SC 2005), aff' d 514 F.3d 345 (4th Cir. 2008) plaintiffs and defendants submitted their collective action FLSA overtime claims to an arbitrator. Instead of handling the case as a collective action "opt in" case, the arbitrator applied Rule 23 class action rules. *Long John Silver's Restaurants* (LJS) argued, and the United States Department of Labor submitted an amicus brief agreeing that "section 16(b) grants employees a distinct substantive right to participate in a collective adjudication of their claims if, and only if, they provide a written consent that is filed with the court." (Appendix A, Doc. 11, page 2). Plaintiffs in this action agree with LJS and DOL that collective actions are a substantive, non-waivable right that must be heard as an opt-in class by either a court, or, if the parties agree, by an arbitrator.

The Fourth Circuit disagreed with LJS and the Department of Labor, finding that the § 216(b) collective action remedy is procedural, not substantive. *Long John Silver's Restaurants v. Cole*, 514 F.3d 345 (4th Cir. 2008). Zekri contends that the Department of Labor got it right. The Fourth Circuit's opinion not only erroneously concludes the collective action right is procedural, it allowed an arbitrator to re-write the FLSA and The Portal-to-Portal Act.

The Fourth Circuit's decision in Cole cannot be reconciled with the Eleventh Circuit's decision in Grayson. It is well-established in the Eleventh Circuit that FLSA collective actions and Rule 23 class actions are "irreconcilable," and collective actions are a policy decision by Congress. *Grayson*, 79 F.3d at 1096, n.12. LJS and the Department of Labor's position is wholly consistent with Zekri's position that the § 216(b) collective action remedy is a substantive, non-waivable right that must be considered by the court, or, if the parties have, agreed by the arbitrator. Like the Department of Labor, Zekri does not care if this collective action is heard by a court or arbitrator so long as it is heard as a collective action. The DOL and Zekri's position is also in accord with the Supreme Court of California's view that
"class arbitration [is] a well-accepted alternative to class litigation on the one hand and individual arbitration on the other" so that there no waiver of the collective action remedy in overtime cases. *Gentry*, 42 Cal.4th at 455,, 165 P.3d at 562, 64 CalRptr.3d at 781 (2007).

C. Macy's "Opt Out" Requirement Is An Invalid "Contractual Exhaustion" Requirement; Neither The Judiciary Nor An Arbitrator, Much Less A Corporation, Can Infer A Statutory Remedy Congress Did Not Expressly Create Or Excise, Reduce, Modify, Or Change A Statutory Remedy Congress Expressly Created

Under the co-called "opt-out" requirement in Macy's arbitration program, each individual employee must "opt out" of arbitration. (Exhibit 1, page 5). The right to opt out requirement is set forth on page 5 in the middle of the last paragraph and provides, "Arbitration is a voluntary condition of employment. Associates are given the option of excluding themselves from Step 4 arbitration within a prescribed time frame." (Exhibit 1, page 5). The arbitration program uses the phrase "prescribed time frame" again on page 6. Nowhere in the arbitration plan is "prescribed time frame" stated. (Exhibit 1, passim). The only hint at what the "prescribed time frame" means is the declaration of Robert Noeth, who states that Zerki was given 30 days or less to decide whether to "opt out." (Noeth Decl., ¶¶ 25, 28).

Zekri was given an "Early Dispute Resolution Program Election Form," which provided him with a one time right to opt-out of arbitration within 30 days of his employment. The "Early Dispute Resolution Program Election Form," states that the employee understands ". . . that my election as of this date is binding for the duration of my employment with Federated Department Stores, Inc. and after my employment ends." (Exhibit 1).

If and only if an individual employee exercises the one time "opt out" right during the 30 day "election period" can later "opt in" to an FLSA collective action or bring an FLSA collective action case on behalf of those similarly situated. In grafting a very limited "opt out" requirement on top of the statutory "opt –in" procedure, Macy's ensures that collective actions will never be brought. Requiring every employee to "opt out" of arbitration within 30 days at the beginning of his or her employment before being allowed to "opt in" to later FLSA collective action renders the § 216(b) collective action remedy anything but "collective."

Federal courts have consistently rejected "contractual exhaustion" requirements such as Macy's "opt out" procedure. Steven M. Warshawsky, *Gilmer, The Contractual Exhaustion Doctrine, and Federal Statutory Employment Discrimination Claims*, 19 The Labor Lawyer 285, 305-324 (Winter/Spring 2004)(collecting cases). "Contractual exhaustion" is a requirement purporting to prohibit the employee from pursuing remedies under the statute until the employees has taken certain actions, *i.e.* exhausted contractually imposed procedures that are not set forth in the statute. *See generally Law v. Howard Univ.*, 558 A.2d 355, 356 (D.C. 1989). Macy's is confusing or attempting to combine contractual exhaustion with arbitration; contractual exhaustion is different from and incompatible with arbitration agreements. *Brennan v. King*, 139 F.3d 258, 267 n. 11 (1st Cir. 1998).

Macy's "opt out" procedure is far more restrictive than contractual exhaustion requirements

federal courts have rejected. In the usual circumstance, contractual exhaustion is required after the employee's cause of action comes into existence and before the employee asserts an action in court. Macy's contractual exhaustion requirement –the "opt out" procedure– must be fulfilled before the cause of action even exists. (30 days after employment or receipt of the arbitration program). If the employee fails to "opt out" at the beginning of his employment, his right to join or bring a § 216(b) collective action is waived.

Moreover, grafting of an "opt out" procedure similar to F.R.Civ.P. 23 class actions on top of the § 216(b) collective action is contrary to Grayson and numerous other Eleventh Circuit decisions. Grayson, 79 F.3d at 1096, n.12 (". . . it is clear that the requirements for pursuing a § 216(b) class action (sic) are independent of, and unrelated to, the requirements for class action under Rule 23 of the Federal Rules of Civil Procedure. See e.g. LaChapelle v. Owens Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975) (Rule 23 and § 216(b) actions are 'mutually exclusive and irreconcilable').")

"Contractual exhaustion" has been isapproved because neither courts nor arbitrators nor companies such as Macy's have the authority to re-write statutory text. Where, as here, Congress has specifically created a remedial statutory scheme, it is not the judiciary or arbitrator's role to supplement, change, modify, enlarge or reduce the remedies Congress placed in the statute. *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991)(Scalia, J.)

Casey presented the question of whether expert witness fees could be recovered under 42 U.S.C. § 1988 despite the absence of any reference to "expert witness fees" in the statute's text. Writing for the Court, Justice Scalia noted that "[a]t least 34 statutes in 10 different titles of the U.S. Code explicitly shift attorney's fees and expert witness fees." (emphasis in original). In other words, 34 statutes authorizing recovery of attorney's fees specifically refer to and contain language referring to "expert witness fees." Justice Scalia, creator of the "new textualism" concluded that where statutes contain an unambiguous phrase, courts do not permit the phrase or the remedy to be "expanded or contracted." *Casey*, 499 U.S. at 98-99, 111 S.Ct. at 1147.

Here, §216(b) unambiguously provides for collective actions alongside overtime compensation, liquidated damages, and attorney's fees. Courts must construe the remedies in §216(b) as part of one corpus juris and are not free to "expand or contract" § 216(b). Casey, 499 U.S. at 98-99, 111 S.Ct. at 1147. Macy's "opt out" provision is invalid because it writes the collective action remedy out of § 216(b), impermissibly removing a substantive, statutory remedy, a policy of Congress enacted into law.

D. THE DECISIONS CITED BY MACY'S ARE INAPPOSITE

Macy's relies on *Caley v. Gulfstream Aerospace Corp.* 428 F.3d 1359 (11th Cir. 2005) to support its contention that the right to FLSA collective actions are waivable. See Motion to Compel Arbitration, p.

18. In *Caley*, the employees argued the arbitration agreement was unenforceable because the arbitration agreement was not signed, the underlying employment did not "affect commerce," waived a jury trial, and lacked the essential elements (offer, acceptance and consideration) under Georgia law. *Caley*, 428 F.3d at 1368, 1370, 1373-1379. In *Caley*, the Eleventh Circuit never reached the issue here --whether the collective action remedy is a substantive, non-waivable right under the FLSA-- because the issue was neither raised nor argued. Moreover, the Eleventh Circuit later clarified that the holding in *Caley* was limited to its facts and does not stand for the proposition that arbitration agreements containing collective action waivers are enforceable. *Dale,* 498 F.3d at 1224. In *Dale,* a consumer class action case, the Eleventh Circuit invalided a class action waiver because the remedy was effectively foreclosed. *Dale*, 428 F.3d at 1224;[5] [6] cited by Macy's address the Plaintiffs'

[5] *See also Cappuccitti v. DirectTV, Civil Action* 1:09-cv-0627-CAP, Dkt Entry 31 (invaliding class action waiver); *Honig v. Comcast of Georgia I, LLC*, 537 F.Supp.2d 1277 (N.D.Ga. 2008)(consumer class action approving class action waiver due to attorney's fee provision).

[6] One of the reasons the Eleventh Circuit invalided the waiver in *Dale*, a consumer class action, is the absence of an attorney's fees shifting statute or clause. *Dale*, 498 F.3d at 1222-1223. Similarly, Macy's arbitration program contains confusing language that can be construed as limiting the amount of attorney's fees reimbursed to a

argument here that the FLSA collective actions is substantive, non-waivable right created by a policy of Congress.[7]

E. MACY'S ARBITRATION PROGRAM IS INVALID UNDER GEORGIA LAW

Arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract." 9 U.S.C. § 2. The purpose of the FAA was to place arbitration agreement on the same footing as other contracts. Therefore state contract law, whether originating through the legislature or judiciary, is applicable to determine the validity, revocability, and enforceability of arbitration contracts. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). The FAA preempts state law only to the extent it treats arbitration agreements differently than other contracts. *Circuit City*, 532 U.S. at 112. To determine whether a binding arbitration agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts. The federal policy favoring arbitration is

successful employee to $2,500. (Exhibit 1, Article 15, page 14, Article 16, page 15).

[7] Similarly, the issue before this Court was neither raised nor addressed in *Nguyen v. Federated Dept. Stores, Inc.*, 2005 U.S. Dist. LEXIS 39642 (N.D. Ga. July 12, 2005)(Forrester, J.). The only contention by the plaintiff in Nguyen was that he did not receive a copy of Macy's arbitration program in the mail. Id. at * 9.

taken into consideration when applying ordinary state law.

1. Unconscionability; Violation of Public Policy

In Georgia, the parties are free to contract on any terms and about any subject matter in which they have an interest unless prohibited by statute or public policy. *Porubiansky v. Emory University*, 156 Ga. App. 602, 275 S.E.2d 163 (1980). Any impairment of the right to contract "must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation." *Id.* Contracts prohibited by public policy are broader than those prohibited by statute. Ga. Code Ann. § 13-8-2 (Contracts contravening public policy are not limited to the list in § 13-8-2). "[T]he basic test for determining unconscionability is 'whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.'" *NEC Techs., Inc. v. Nelson*, 267 Ga. 390, 478 S.E.2d 769, 771 (1996.) Georgia courts look to the circumstances at the time the parties formed the contract, (procedural unconscionability) and the terms set forth in the contract. (substantive unconscionability).

Waiver of the § 216(b) collective action remedy is prohibited not by the text of FLSA was as a matter of public policy as well. The legislative history of the FLSA and the decisions of federal courts (cited above)

recognize the public interest in collective action. An employee's right to engage collective action, or not act collectively, is statutory and a matter of public policy in Georgia. Ga. Code Ann. § 34-6-21 (Unlawful for employers to demand that employees refrain from membership in a labor organization, i.e. collective action, as a condition of employment). Refraining from collective action is precisely what Macy's contract, the arbitration program requires in violation of Ga. Code Ann. § 34-6-21. The Eleventh Circuit has had no difficulty in concluding that class action waivers that make the right to proceed prohibitively expensive are unconscionable under Georgia law because such waivers violate public policy. *Dale*, 498 F.3d at 1220 *citing Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)(Reason for class actions is that "small recoveries do n ot provide the incentive for any individual to bring a solo action prosecuting his or her rights.") and *In re: Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989)(Effort and cost in investigating and bringing claim may be greater than many claimant's individual stakes in the outcome, discouraging the prosecution of these claims absent a class action filing procedure."). *Dale* was a consumer action where the class action waiver was invalidated as unconscionable, against public policy. The public policy underlying the FLSA is clearer and more developed.

Moreover, courts have recognized the "public interest in employees' capacity to take collective action" in other contexts, that it is a matter of public policy. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *In re Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989) ("[T]he effort and cost of

investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure."). *Eisenberg ex rel NLRB v. Lenape Products, Inc.*, 781 F.2d 999, 1006 (3d Cir. 1985). Collective action is a substantive matter of public policy when individuals act to violate the law. *United States v. Doherty*, 867 F.2d 47, 61 (1st Cir. 1989)(Breyer, J.)(Rationale of conspiracy is that "collective action toward an antisocial end involves a greater risk to society than individual action toward the same evil.") A statute such as § 216(b) that specifically allows and encourages collective action to effectuate an important societal interest is no less a matter of public policy than a conspiracy statute designed to prohibit collective action for something contrary to the societal interest.

Waiver of § 216(b) collective action is prohibited under Georgia law because it is against public policy, against the public interest, to require employees to refrain from collective action.

2. Indefinite Subject Matter; Vagueness

Georgia courts do not ". . . presume[d] that parties intend to contract away their legal rights in regard to a subject matter not clearly appearing therein." U. S. *Anchor Manufacturing, Inc. v. Rule Industries, Inc.*, 264 Ga. 295; 443 S.E.2d 833 (1994). Moreover, language creating an exception or waiver to a statutory requirement must be strictly

construed. *Crider v. Zurich Insurance Co.*, 222 Ga. App. 177, 474 S.E.2d 89 (1996).

In *Caley*, arbitration agreement at issue contained the following language:

> The Employee further agrees that no Covered Claim may be brought as a class or collective action either under this Policy or in court and that he/she will not act as a class or collective action representative or participate as a member of a class of claimants with respect to any Covered Claim. [Emphasis added].

The collective action waiver in *Caley* is substantially different from the purported waiver in Article 11, Section f(ii) of Macy's arbitration program:

> The Arbitrator shall not consolidate claims of different Associates into one (1) proceeding. Nor shall the Arbitrator have the power to hear an arbitration as a class or collective action. [Emphasis added].

In both *Caley*, the waiver language explicitly describes what the employee cannot do, specifically, that the employee is barred from bringing a collective action One of the key factors in Caley that made its waiver enforceable is that an employee can clearly and easily identify, in one concise paragraph, what rights he is agreeing to forego. By contrast, Macy's arbitration program only addresses what the arbitrator cannot do, i.e. the arbitrator's lack of

authority to hear a collective action. Macy's contends its arbitration program requires employees to bring their claims individually (*Motion to Compel Arbitration*, p. 25) and that because of this requirement the collective action has been waived. Nowhere in Macy's arbitration program is there a provision that employees must bring their claims individually. Even if there was such language, it would still require an employee to piece together disparate sections of the program materials to cobble together a waiver. Macy's arbitration program simply does not contain an unambiguous waiver of the employee's right to bring a collective action. In fact, the opposite interpretation more closely follows the plain language of the program. Precisely because the arbitrator does not have the authority to hear a collective action suggests that there is a forum that does have the authority to hear it (a court), not that this right has been waived. Even if § 216(b) were allowed, which is vehemently denied, without an express waiver of collective actions, the arbitrator's lack of authority to hear collective actions requires Macy's motion to dismiss, compel arbitration and strike the class allegation to be denied.

CONCLUSION – REQUEST FOR RELIEF

For the reasons stated in this brief, Plaintiffs request that the Court deny Macy's Motion for an order (1) compelling arbitration on an individual basis, (2) striking class allegations, and (3) dismissing, or in the alternative, staying action pending arbitration.

This 13th day of August, 2010.

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